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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 65

LATVIAN STATE CARGO AND PASSENGER STEAMSHIP LINE,

Petitioner,

against

J. HOWARD McGRATH, Attorney General of the United States and Successor to the Alien Property Custodian,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[illegible]
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Latvian State Cargo and Passenger Steamship Line prays for a Writ of Certiorari to review a decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 23, 1951, affirming a judgment of the United States District Court for the District of Columbia granting a motion of defendant, before answer, for summary judgment and entering judgment for defendant (Rec. pp. 66, 60).

Opinions Below

The opinion of the Court below (by Prettyman, C. J., Miller, C. J., joining and Stephens, Chief Judge, concurring without opinion) is set forth in the record (pp. 62-65)

but is as yet unreported. The opinion of the District Court (Pine, J.) is set forth at pages 56-59 of the record and is reported at 80 F. Supp. 683.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 23, 1951 (R. 66). The jurisdiction of this court is invoked under the provisions of Section 1254(1) of Title 28, United States Code.

Questions Presented

1. Must a federal court regard non-recognition by the United States of a foreign sovereign as an expression of determinative policy which prevents any consideration of the merits of a claim based on the law of the unrecognized government, even though such law would be otherwise effective under the normal rules applicable under the conflict of laws principles generally accepted and applied in the United States.

2. Where a controversy exists between foreign nationals, as to a claim of title to property vested by the Attorney General's predecessor, and the United States is a mere stakeholder, may a federal court, because of non-recognition of a government conceded to exist in fact, decline to consider the relative merits of the foreign claims asserted, and thereby deprive one of the claimants of a right to litigate which it would have had but for the vesting.

Statutes Involved

The present action is one under Section 9(a) of the Trading With The Enemy Act, 50 U. S. C. App. § 9(a). The decision of the court below is claimed by petitioner to be incompatible with U. S. Const. Art. III, Sections 1, 2.

Statement

Petitioner is a corporation of the Union of Soviet Socialist Republics, a foreign, friendly sovereign (R. 2). At a time prior to the date of the vesting orders of the Alien Property Custodian which led to this action, and subsequent to the establishment in 1940 of the (unrecognized) Latvian Soviet Socialist Republic, petitioner became engaged in litigation with certain other alien nationals, involving their conflicting claims of ownership to three Latvian vessels (R. 27-8). Petitioner's claim was based on a transfer which was in turn based on acquisition of title to the vessels by "nationalization upon compensation" by the unrecognized regime (R. 54). The adverse claims were in behalf of alleged former owners of either the vessels, or an interest in a nationalized entity which had owned them (cf. R. 36, 52 with R. 38).

Two of the vessels involved were on the high seas at or shortly after promulgation of the second nationalization decree (R. 45); the third was in drydock in Brooklyn (id.) but may have been on the high seas at the time of the first decree, and undoubtedly was some time after the second (R. 29). The vessels had, after their arrival in American waters, been taken hold of in litigation arising from the conflicting claims by the United States District Courts for the Southern and Eastern Districts of New York. These courts (per Knox, C. J. and Galston, D. J., respectively), had thereupon appointed petitioner's agent, Charles Recht, and another, as trustees for the conservation and operation of the vessels, pending adjudication of the conflicting claims (R. 27-8). Thereafter, in the Eastern District, the attempt of one Bilmanis (then recognized as Latvian Minister) to intervene in the proceeding was rejected because of laches, and the German nationality of the former owner he purported to represent (*The Regent,* 47 F. Supp. 995). The opinion which denied status to Bilmanis discloses the orderly procedure for adjudicating the conflicting claims which was being pursued; and that the particular ship in-

volved had been sunk, and the trustees directed to hold the insurance fund intact (id.). By June, 1942, all three ships had been sunk by enemy action (R. 34).

Thereafter, on a recital of enemy interest, the Alien Property Custodian made orders vesting the interests of the trustees, in each of the funds representing the sunken ships (8 F. R. 11304, 12831). The vesting orders, at the insistence of the Custodian, made "moot" the judicial proceedings then pending (Petition of John F. X. McGohey, April 29, 1946, in Ad. 122-40, S. D. N. Y.). The Attorney General—successor to the Custodian—subsequently determined to treat separately the conflicting claims of petitioner and its former opponents in the New York Federal Court proceedings; on disallowance by his subordinates of this petitioner's claim, the present action was begun.

The court below has affirmed an order granting summary judgment for respondent. The motion for summary judgment was made before answer. It was granted by the District Court on the ground—not expressly adopted by the court below—that "a court may not give effect to an act of an unrecognized government" (R. 57). But the court below felt obliged nevertheless to affirm. Despite its finding that "the nationalization decrees were restored to effect" when the Nazis were expelled from Latvia (R. 63) and that "the results which would normally be reached under the rules governing conflicts of laws" might involve application of such decrees to the ships claimed by petitioner, the court yielded to respondent's contention which it summarized:

> "When the executive branch of the Government has determined upon a foreign policy which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts" (R. 65).

Specification of Errors to be Urged

1. The Court of Appeals erred in deeming itself obliged to subordinate itself to executive control and to reject "the usual rules applicable under the established doctrines of conflicts of laws", on the record herein, and the decision reached is not required or justified by *United States* v. *Pink*, 315 U. S. 203.

2. The Court of Appeals erred in regarding the Executive Branch as endowed with competence to express effective "non-recognition of specific foreign decrees".

3. The Court of Appeals erred in allowing the Custodian's successor—on a record in which the sole interest of the United States is as a stakeholder—to deprive the petitioner of a trial or judicial hearing at which the merits of its claim adverse to other foreign nationals could be examined.

4. The Court of Appeals erred in depriving petitioner of judicial examination of the propriety of the taking of its property by the Alien Property Custodian.

Reasons for Granting the Writ

The Court of Appeals has decided questions of general importance which have not been, but should be settled by this court; in so doing the court has given improper effect to a decision of this Court (*United States* v. *Pink*, 315 U. S. 203) and has failed to give proper effect to an applicable decision of this court (*United States* v. *Belmont*, 301 U. S. 324). Moreover, the result reached raises a substantial question as to the construction and application of Article III, Sections 1 and 2 of the Federal Constitution.

The case presents important issues of federal law which have been and will be frequently litigated,* and in respect of which not only federal but state courts look to this Court

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* Chinese cases have already begun to appear, e.g.: *Bank of China* v. *Wells Fargo*, 92 F. Supp. 920 (N. D. Cal.); *Rep. of China* v. *American Exp. Co.*, 95 F. Supp. 740 (S. D. N. Y.); *Chase Nat. Bank* v. *Directorate, etc. Bank*, 95 F. Supp. 733 (S. D. N. Y.)

for guidance. Litigation involving the effect of acts of unrecognized governments necessarily follows in the wake of employment by the Executive Branch of the policy of non-recognition of *de facto* administrations of undoubted stability. No court has competence to review or examine the merits of such policy; but, we submit, the court below was in error in subordinating the determination of a purely judicial question to what it must have considered was required by the exigencies of such policy. This court's power of supervision is called for because of the importance of clear delimitation between the area of judicial determination, and the area of executive supremacy, as previously understood to exist, under the decisions of this and other courts of last resort.

The court below did not find its path an easy one. It is not often that a United States Court of Appeals holds a case, on a record as slender as this, for a year and two days between argument and decision.[1] Its difficulty was not lessened by the Attorney General's attempt to establish the doctrine that an expression by a member of the Executive Branch on "legality" of a foreign law will "constitute a determination * * * of a political question in the field of foreign policy which is binding on the courts" (Gov't Br. C. C. A. 14). The New York Court of Appeals —early in the history of these attempts—was puzzled and skeptical as to how "by 'formulation' of its public policy as to the effect of the decree" the Department of State "could change the judicial question determined by the court below into a 'political question' which the courts are not empowered to decide." *Anderson* v. *N. V. Transandine*, 289 N. Y. 9, 20. The Attorney General has persisted nevertheless, and succeeded below.

It has been authoritatively written of this Court that

> "This tribunal is the ultimate organ * * * for adjusting the relationship * * * of the three departments of government to one another."

[1] Even so, the opinion writer displayed confusion in, for example, regarding *The Navemar* (303 U. S. 68) as a case where "the State Department refused to certify a policy of hostility to decrees of the unrecognized governments" (R. 64).

> Frankfurter, Law and Politics 21 (XIV Encyc. Soc. Sci. 424).

Such adjustment is called for here. A parallel question merited certiorari,[2] but escaped decision, in *U. S. ex rel. Touhy* v. *Ragen,* 340 U. S. 462, 95 L. Ed. 345. Whether a court might be ousted from inquiring into what was ordinarily a judicial question presented a question of constitutionality which *Touhy* deferred to a factual situation requiring a ruling.

The court said in *Marbury* v. *Madison,* 1 Cranch 137, 167:

> "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."

But, said the court below, "non-recognition of specific foreign decrees" by the Executive Branch "must be given effect by the courts" "regardless of the results which would normally be reached under the rules governing conflicts of laws" (R. 65). This, despite the notice taken by the court, that

> "Germany having been defeated and Latvia having been reoccupied by the Union of Soviet Socialist Republics, the Latvian Soviet Socialist Republic was reestablished and the nationalization decrees were restored to effect" (R. 63).

1. The case presents the important question as to whether, even if the Executive were competent to "recognize" the "legality" of a foreign decree, such "recognition"—or "non-recognition", as certified in this case, is *binding and conclusive* on this or any other court of the United States.

In broad, the question of the asserted effect of a foreign decree upon the facts before an American court, will

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[2] At p. 348 of 95 L. Ed. adv. op.: "Among the questions duly presented by the petition for certiorari was whether it is permissible for the Attorney General to make a conclusive determination not to produce records", 340 U. S. at p. 467.

usually depend on proof of its promulgation; its interpretation; and "jurisdiction"—"the power of a state to create interests which under the principles of the common law will be recognized as valid in another state" (Restatement, Conflict of Laws, § 42). It had not been considered, or seriously contended, prior to the *Pink* case, *supra,* that these were other than judicial questions nor did that case decide anything to the contrary. It had been held, in a case where, unlike the present one, the United States had a proprietary interest, that "the validity of the title acquired (under foreign law) is subject to judicial inquiry"; that while the

> "courts will leave for the Executive the determination of all 'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property"

and that

> "A broader interpretation of 'political questions' is unnecessary to the effective conduct of diplomatic relations with other countries and is undesirable as subjecting issues of private property to the changing circumstances of international politics beyond what is inevitable in any event."
>
> Clark, C. J., in *Banco de Espana* v. *Federal Res. Bank of N. Y.,* 114 F. (2d) 438, 442.

That a question as to non-recognition of a government might be involved does not of itself affect the scope of the judicial function in giving consideration to what might be the appropriate effect of foreign law, in a particular case. The Department of State expressed itself on this point, in no uncertain terms, in a communication of record [3] in *M. Salimoff and Co.* v. *Standard Oil Co.,* 262 N. Y. 220.

> "The question as to the validity of acts and decrees of an unrecognized regime would appear to be a matter to be decided by the courts in an appropriate case."

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[3] Letter to counsel, of January 26, 1932, printed at p. 13, Brief of Respondent.

And the Department's acknowledgment of the limit of Executive competence was adopted—without crediting the source—in Chief Judge Pound's opinion (at p. 224).

Did the *Pink* case require an abatement of the judicial function, when non-recognition exists? Did this Court either by decision there, or its expressions on the issues, instil into non-recognition a vitality which must be taken to check and reverse the trend of jurisprudence to minimize the significance of non-recognition, in cases not involving the issues previously thought to be directly determined by recognition? Two judges of the court below thought so (Stephens, C. J., concurring only in the result); two judges of the Court of Appeals for the Third Circuit thought so, in *The Maret*, 145 F. (2d) 431 (Goodrich, C. J., rejecting their reasoning on this point.)[4]

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[4] The Third Circuit in *The Maret*, reached a result which cannot be reconciled with its own earlier decision in *The Denny*, 127 F. (2d), 404, 410, where the court said:

> "Finally it is argued that since the government of the Lithuanian Soviet Socialist Republic and its admission to the Union of Soviet Socialist Republics have not been recognized by our government this court may not, by permitting Recht to act under the powers of attorney given to him, recognize or give effect to the decrees of the Soviet Socialist Republic which reorganized Lietukis and nationalized Baltic Lloyd. But these are both Lithuanian associations and the parties in interest, so far as here appears, are all citizens of Lithuania and domiciled therein. The rights of American citizens or residents are not involved. We may not ignore the fact that the Soviet Socialist government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. It follows that the respondents may not question in this court the validity of the Lithuanian decrees insofar as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the associations' officers and offered in this proceeding."

Judge Goodrich, concurring in *The Maret*, on the grounds themselves at variance with the unanimous decision of the Second Circuit in *The Navemar*, 102 F. (2d) 444, dissociated himself from his colleagues' decision which imported an "affirmative" effect, never before supposed to exist, into non-recognition.

We submit that *Pink* is warped beyond recognition in *The Maret* and the decision below; that it is in the interest of sound administration of justice that the misapprehension as to the scope and meaning of *Pink* be now corrected by this Court. *If, since* Pink, *it is no longer correct to say*:

> "[The State Department] cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question but a judicial question." [5]

Or say:

> "(Executive) action in recognizing a foreign government * * * is conclusive on all domestic courts which are bound to accept its determination, *although they are free to draw for themselves its legal consequences in litigation pending before them.*" [6]

the revision involved should be expressed directly by this court, and not left to dubious implications.

Pink, of course, dealt not with non-recognition and its consequences; moreover, it did not deal with the effect of recognition itself, *as such.* It dealt rather (in respect of the portion of the opinion here material) with the power of the President to prescribe a rule of distribution—a "globular * * * regrouping of assets" which would exclude foreign creditors of nationalized Russian corporations, in favor of American nationals, having claims against the Soviets, *which had theretofore been an obstacle to friendly relations and hence to recognition.* The power thus considered, being held to exist as an incident to recognition, was sufficient to overcome the local interest of New York in prescribing a different rule of distribution, as to assets within its territorial jurisdiction. The only decision of the Executive held to be "final and conclusive" on the

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[5] *Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, 158.

[6] *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 138 (emph. supp.).

courts was the judgment of the President that "full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals"—thus upholding the rule of distribution he had prescribed.

Thwarted, if the decision below in *Pink* had been upheld, would have been the purpose of the President to remove the obstacles to recognition, in the exercise of his constitutional prerogative to make an Executive Agreement.

No policy or purpose of the Executive could be thwarted by decision of the present case in accordance with the "usual rules applicable under the established doctrines of conflicts of laws". Title to property would be determined; but no tangible "comfort" to the unrecognized regime would be given; the Executive has already seen to that. By exercise of its undoubted power to establish "freezing controls", the Executive Branch may withhold the fruits of this action from petitioner—even though it be a corporation of a recognized regime—until it is deemed compatible with the interests of the United States that defrost be permitted.[7] In *Pink*, on the other hand, no remedy was available, except by judgment for the United States, to give effect to the Presidential policy to prefer American nationals over foreign claimants. And even *Pink* did not decide that the claims of the foreign creditors of the nationalized corporations were without merit, *or were to be weighed by rules of law promulgated by the Executive.* The foreign claims were merely excluded from participation in a distribution here.

Indeed, the court below has seemingly been persuaded by argument based, not on the record, but on "considerations on which [the foreign policy adopted by the Executive] is based and the consistency and vigor with which it has been pursued from 1940 to the present" (Gov. Br., C. C. A., p. 5 and compare Br., pp. 5-11 with opinion N. 12,

[7] See Executive Order 8484, lifted by General License No. 94 (10 F. R. 14814) only as to Latvian assets acquired after December 7, 1945.

R. 65). We do not see how it can be material for the court to evaluate "considerations" on which a policy is based, or its "consistency and vigor", unless it be invited to approve the policy. That is certainly forbidden by *Pink* and a long line of predecessors! If "objections to the underlying policy are to be addressed to the political department and not to the courts" (315 U. S. at p. 229) it is pretty obvious that praise of the policy, or rationalization in its behalf belongs in some other forum. As Judge (now Chief Judge) Learned Hand said in *The Florence H*, 248 Fed. 1012, 1017:

> "A court, which is not authorized to treat in any fashion with foreign powers, should be in consequence quite inaccessible to any suggestion which is based upon international considerations."

It is not for the Attorney General to defend, not for us to criticize, not for the court to weigh, the propriety of continued non-recognition of the decade-old regimes in the Baltic republics. If the consequences of non-recognition would not defeat petitioner's claim under the "usual rules applicable under the established doctrines of conflicts of laws", then why should it matter that the policy is deemed a "good" one? No more than, if petitioner's claim were without merit, it would be helped if the policy of non-recognition is a "bad" one.

2. Apart from the "conclusiveness" of non-recognition of a regime, the case presents for examination for the first time, in this court, an asserted competence of the Executive to recognize the "legality" of "laws and decrees" of a foreign, unrecognized government. A "certificate" appears in the record—quoted in full by the court (R. 64)—that "the legality of the so-called 'nationalization' laws and decrees, or any of the acts of the Soviet regime which assumed power in Latvia" "has not been recognized by the Government of the United States". The suit of the petitioner is rejected because the "control of the executive branch over foreign affairs must necessarily" be broad

enough to include "non-recognition of specific foreign decrees" (R. 65).

The certificate quoted is curious, though not entirely unprecedented. The recent practice of employment of such a certificate warrants consideration by this Court of the claimed meaning of such a certificate, the claimed source of the power under which it is promulgated; and the compatibility of such claimed power with Article III, Sections 1 and 2 of our Constitution.

The importance of the question is enhanced by the societal implications of the purported exercise of the power: [8] the consequence of establishing, as a "judicial vacuum" the area governed by a regime conceded below to have "effective administrative and governmental control within Latvian territory" (Gov't br., C. C. A., p. 43). There is, moreover, no "government-in-exile" recognized or otherwise, no other source that may be looked to as to what is the law of Latvia, governing the relations of its inhabitants.

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[8] When organized social control exists in another country, it is incompatible with the classic view of conflict of laws to "posit the legal non-existence of non-recognized communities". Whether or not the sovereign is recognized is beside the point.

> "Indeed the essential thing is just this organized social control rather than the mystical essence called sovereignty. The function of a conflict of laws is to coordinate the many spheres of social control, to assign to each the objects best suited to be controlled by it, and by the same principle to exclude others. It is a broad application of the principle of the division of labor. To apply the law of another state is not to do that state a favor or to grant it a privilege because we approve of it or have welcomed it into our exclusive coterie; it is to recognize the universal need for order and predictability, to realize that in a given portion of the globe the privilege and obligation of maintaining that order is committed to one organization and not to some other, to appreciate that the maintenance of that order must be 'respected' to a certain extent if it is to fulfill its function. We may not like that order, but to ignore it or suppose that some other exists is to produce an entirely useless anarchy and confusion."

See *Jaffe, Judicial Aspects of Foreign Relations* 166-7, 236.

The asserted jurisdiction of an executive official to grant or withhold recognition to a law or decree will neither find support in authority nor withstand analysis. If "no executive department of the government is constitutionally or practically equipped" (even in a case touching on foreign affairs) to pass upon "present rights to property within a court's jurisdiction" (*Sullivan* v. *Sao Paolo,* 122 F. (2d) 355, 358) is such department equipped to pass upon a crucial judicial ingredient in such determination?

The Secretary of State did not think so, as recently as the *Salimoff* case, see supra, p. 8, referring to communications to counsel in that case.

Professor [now Ambassador-at-large] Jessup did not think so. In commenting on the *Anderson* case, *supra,* he said of the "suggestion of interest" filed by the Attorney General:

> "In that suggestion, the State Department in effect undertook to tell the court how it should determine certain questions of law, *but the New York Court of Appeals properly reached its own conclusion as to the legal rules applicable*" (40 A.J.I.L. p. 171).

No authority was cited below to support the asserted power of the Executive Branch to "recognize" the legality of a foreign decree. In a proper case, the force of a foreign decree may be affected by recognition of the enacting government. What function is exercised however, when "legality" of the decree itself is "recognized"? What effect is it claimed to have, and by virtue of what constitutional principle—or implication from what constitutional power?[9] Does the power to "recognize" "legality" of a decree embrace the lesser power to construe? May a de-

[9] The question here is not as to the "public policy" that may be involved in enforcement of the Latvian decree, or as to whether there is even room, on the facts, for the operation of the so-called "public policy exception".

The court below disclaimed to pass on "public policy", and so itself did not presume to hold, in opposition to this Court's decision in *United States* v. *Belmont, supra,* that *any* public policy of the United States could be involved in a controversy between aliens, in which no American national has a recognizable interest.

cree of a recognized government be denied "recognition" as to "legality" by the Secretary, acting in the exercise of the newly-found power?

It has been thought ever since *Marbury* v. *Madison*, 1 Cranch at pages 177-8 that: "It is emphatically the province and duty of the judicial department to say what the law is * * * this is the very essence of judicial duty." It seems plain to us that judicial power cannot be assumed so easily by a member of the Executive Branch—merely because a decree of a foreign regime is involved.

> "If the courts may not presume to intrude on governmental functions and to determine the exact nature and extent of diplomatic relations, so likewise the diplomat may not properly intrude upon and attempt to determine the nature and extent of purely juridical functions." (Brown, The Recognition of New States and New Governments, 30 A. J. I. L. 689, 694.)

We respectfully suggest that the State Department made a factual statement, of importance to a court, in describing the Latvian S.S. R. as "the regime now exercising governmental functions" in Latvia (R. 55). Such a factual declaration, as to a situation abroad, is as clearly within its competence as "recognition" of "legality" of a decree is not.

What is supposed to be the status of a law or decree, not favored by "recognition" as to its "legality"? Is it illegal? If so, by what law? By what standard? Even the court below was constrained to admit cognizance of the fact that in Latvia "the nationalization decrees were restored to effect" upon the expulsion of the Germans in 1944. A law which is in effect in the place where promulgated may be displeasing in some eyes, but we cannot see that anything is subtracted from it by Executive declination to "recognize" its "legality".

Reference may be made to the decision of this Court in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, wherein a corporation of an unrecognized state was held to be an "alien friend", no less entitled to just compensation for a governmental taking, than any other owner of property here. Would it have been possible to change the

result there by a "certificate" of "non-recognition" of the "legality" of the Soviet legislation [10] under which the *Fleet* corporation's existence was continued? Such an inference is not compatible with such statements as:

> "it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the aliens' country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent on the standards of other governments" (p. 492 of 282 U. S.).

A foreign law—even of an unrecognized sovereign—may not be examined as to *validity* by a court, only as to *applicability*. The classic statement in *Underhill* v. *Hernandez*, 168 U. S. 250, 252, includes:

> "Nor can the principle be confined to lawful or recognized governments or to cases where redress can manifestly be had through public channels."

The function of the Executive as to a foreign law extends to determining whether it is lacking in "legality" only in a single sense: the international law sense. Insofar as such a law affects the rights of American nationals, it is the function and duty of the State Department to pass upon whether, in an international forum, the foreign law may be characterized as violative of treaty or other obligations of the enacting state to the United States. But to state this proposition is only to illuminate further the lack of competence in the Executive, for the purpose of litigation in a municipal court, to withhold a recognition of legality to the foreign decree.

3. The effect, if not the purpose, of the vesting orders was to withdraw from a court having jurisdiction a contest between petitioner and a Latvian company and/or [10a]

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[10] It is not without significance here that the Soviet Government's interest in and control over the *Fleet* was so clear and complete that it assigned the claim ultimately under the Litvinoff Assignment.

[10a] Depending on whether petitioner be found, after trial, to be the domiciliary successor to the Latvian company. *Cf. Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527.

its alleged former owners, as to the relative merits of their claims. The respondent by the vesting order has accomplished a procedurally unjust result of the sort condemned in *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463.

And now in this action, though but a stakeholder, the Custodian's successor asserts:

> "The citizenship and status of the adverse claimants to the vessels and of the company which operated them is wholly irrelevant. Appellant's case must stand on its own merits *and is not affected by the merits or demerits of any conflicting claims*" (br., C. C. A., p. 44).

This is hardly compatible with this Court's ruling in *Belmont* that a "custodian" has no interest sufficient to support a standing to challenge the effect of a foreign decree (at p. 332 of 301 U. S.).

The following is a summary of the merits of our claim, on which, as against the emigré Latvians we were entitled to a trial. As a matter of "general importance"—which this Court may or may not reach, if this petition be granted —it is now the better view that in determining the applicability and effect of foreign laws and decrees—non-recognition should be of slight judicial consequences.[11]

> E.g., Jaffe, Judicial Aspects of Foreign Relations (1933).
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> Brown, The Recognition of New States and New Governments, 30 A. J. I. L. 689 (1936).
>
> Brown, The Legal Effects of Recognition, 44 A. J. I. L. 617 (1950).

It may be, that in a proper case, non-recognition will play some part in consideration of the conflict of laws questions involved in giving effect to a foreign decree. Whether this is such a case cannot be determined on this record, on summary judgment procedure. As between a mere custodian,

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[11] Except of course, in questions directly concerning "who is recognized here as representative of a foreign power", title to public funds, to a ship of war.

and petitioner, it will not do to say before trial or answer that non-recognition suffices to defeat the claim of petitioners. Unless the Custodian should see fit to interplead the adverse claimants, he must respond to the complaint, and assert such defenses to it as he be advised. The only defense conceivable, on this record, is that the adverse claimants have a superior status to petitioner. But this is what petitioner is willing and anxious to litigate; and if the facts and circumstances that may be brought out on a full record are examined, petitioner is confident that its claim will be sustained and a defense, based on adverse claims, rejected. Such defense, however, was not raised by the motion for summary judgment which, being before answer, admitted the allegations of the complaint. *Rogers* v. *Girard Trust Co.*, 159 F. (2) 239.

The court below—unlike the District Court [12] recognized that, apart from the conclusive effect sought to be attributed by the Department of Justice to the policy said to underlie non-recognition, petitioner had a claim which might be good by virtue of "the usual rules applicable under the established doctrines of conflict of laws". We think we need not demonstrate, to secure reversal if our petition be granted, that summary adjudication in our favor is warranted. We can, and we think we should demonstrate, that a court *could* hold our claim superior to that of the emigré claimants; such demonstration, we think, will illustrate how the vesting power has been here misused to deprive us of a trial to which we are entitled, of the merits of the conflicting claims.

No government-in-exile purports to be exercising sovereign power for Latvia or is recognized as such by the United States.[13] The regime which enacted the decrees

[12] The District Court—palpably incorrectly—said "a court may not give effect to an act of an unrecognized government, for by so doing it would tacitly recognize the government"!

[13] Hence, no room exists in this case, for a "fantastic" result such as that arrived at when the "Kerensky regime was, in accordance with diplomatic determination treated as the existing Russian Government a decade after its extinction". See Frankfurter, J., concurring in *Pink* at p. 236.

under which we claim—the same regime that was originally established more than a decade ago—is conceded by opposing counsel (Govt. br., C. C. A., p. 44) and said by the State Department to be "the regime now exercising governmental functions" in Latvia (R. 55). It is appropriate to say: "We all know that it is a government. The State Department knows it, the courts, the nations, the man on the street" (*Salimoff*, 262 N. Y. at p. 226). Ordinarily then, "non-recognition is no answer to defendant's contention, no reason for regarding as of no legal effect the laws of an unrecognized government ruling by force, as the Soviet government in Russia concededly was" (id., p. 228).

Salimoff is not now urged as "conclusive" precedent by petitioner. "There can be no true precedent in the books, when the facts are unprecedented" (*Stoddard*, 240 N. Y. at 163). "The facts of each case, the result of each possible decision determines whether that decision accords with common sense and justice," *id.* A transfer of title to a chattel within its borders by an unrecognized regime will be given effect. A transfer of title to property in New York State may or may not. What rule should apply to a ship on the high seas, at the time of nationalization, or thereafter, and before arrival in the United States?

"Jurisdiction" for effecting a change of title exists, *Restatement, Conflict of Laws*, Sec. 45. A ship which is not only owned by one of its nationals, but of its national registry, is assimilated to a chattel within the borders of the enacting state for most purposes, including transfer of title. This was the holding in *The Navemar*, 102 F. (2d) 444,[14] the only appellate decision in point, as to the effect of a nationalization decree on a vessel on the high seas.[15]

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[14] The Circuit Court in its opinion confused this Court's ruling in *The Navemar*, 303 U. S. at 75, with respect to achievement of possession *in invitum*, with the Second Circuit's subsequent definitive holding as to change in "right to possession" upon the ships "reaching the high seas."

[15] The curious references to "waters of the Western Hemisphere", in the various affidavits in support of the Attorney General's motions, were nowhere explained in his brief. Presumably, it will not be contended that a vessel on the high seas in one hemisphere is of any different status than in the other.

If this be so, there would appear to be no room in this case for application of the "public policy" exception to operation of a "confiscatory" decree—limited, even in the Chief Justice's vigorous dissent in *Pink,* to property within and subject to the laws of the forum state at the time of the promulgation of the opprobrious decree, and at all times thereafter.

Even if funds in a New York bank were involved, could the public policy exception be invoked by Latvian nationals, or a corporate entity established under Latvian Law? It would certainly seem not, under *Belmont,* 301 U. S. at page 332:

> "The public policy of the United States relied upon as a bar to the action is that declared by the constitution namely, that private property shall not be taken without just compensation. But the answer is that our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. Compare *United States* v. *Curtiss-Wright Export Corp.* supra, at p. 318. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows, only the rights of the Russian corporation have been affected by what has been done; and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding it shall be made to appear that they are so affected as to entitle them to judicial relief."

If some question were open as to invocation of the public policy exception, must it be held on this record (before trial or answer) that nationalization upon 25% compensation is as repugnant in 1951, as it might, with "virtuous horror" [16] have been held to be in 1930? Nationalization is no longer a bogey—in *Western* as well as Eastern Europe it is a household word. And compensation far short of the full compensation that is imposed on the United States Government by its own constitution, is usual. See *Doman,*

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[16] See *Jaffe, Judicial Aspects of Foreign Relations,* Chapter III.

Postwar Nationalization of Foreign Property in Europe, 48 Col. Law Rev. 1125, *passim.* Payment in recent years, in depreciated currency, or at arbitrary valuation has made the Latvian offer of 25% seem generous by comparison. But inadequate compensation, by American standards, is the rule in all of Europe today, not the exception.

Arguing with respect to the status in the pre-recognition period of refugee directors of a Russian bank to claim its assets, the Solicitor General recently asserted to this Court (Brief in opposition to certiorari, p. 25, N. 14, *Guaranty Trust Co.* v. *United States,* 332 U. S. 753), we think correctly, that "the authority of the emigré directors to act in the name of the defunct Russo-Asiatic Bank" had no such "official sanction" as that of recognized officers of the pre-Soviet regime. "Their powers were not conclusively established by recognition by the Executive Department, *or otherwise*". Their powers, then, were subject to judicial scrutiny. And all we contend now is that the claims of the emigré Latvians should be subject to judicial scrutiny; that they should subject their status to the test of a court hearing against the merits of the claim we assert.

Ordinarily, the acts and decrees of an unrecognized regime have come to be accepted as fully—with few exceptions—as those of a recognized regime. The authoritative *projet* on the subject, of the *Institut de Droit International* was considered of sufficient importance to have been reproduced in the "Official Document" Supplement of the American Journal of International Law, 30 A. J. I. L. (Supp.) 185. It was unanimously adopted (see 30 A. J. I. L. at 692). It may be regarded, in the private international law field as comparable to a Restatement of the American Law Institute. It states:

> "Recognition 'de jure' of a government implies the recognition of the judicial, administrative or other organs, and the attribution of extraterritorial effects to their acts, in conformity with the rules of international law and particularly under the customary reservation of respect for public order, even if these acts had been consummated before any previous de facto recognition.

> These extraterritorial effects, however, do not depend on the formal act of recognition of the new government. Even in the absence of recognition, they should be acknowledged by the competent jurisdictions and administrations when, considering especially the actual character of the power exercised by the new government, these effects are in conformity with the interests of good justice and the interest of individuals."

Reaffirmation of this view, and unanimous acceptance of it among writers is reflected in Professor Brown's article last year in 44 A. J. I. L. 617 at page 639.

The retrogressive effect of the distortion of the *Pink* case expounded in *Maret* and applied below, will have the effect, if unchecked by this Court, of setting up an unsound standard, unanimously disapproved by experts who have participated in the *Institut.*

The importance of adjudication on a record after trial, as well as a significant source for a finding in favor of petitioner, appears in the very vesting orders of the Alien Property Custodian. The Custodian's rights in this action must be measured by what an adjudication as of the moment before the vesting would show, as to the relative rights of petitioner and the Latvian emigrés. At least one (the vesting order recites all) of the emigrés identified themselves with the Nazi regime in the period 1940-1943. If so, was it so clear that a trial can be dispensed with that a court would not have decided that a de-facto regime had effectually seized their interests?

If the effect of a decree of an unrecognized regime is determined by the "facts of each case", it does not need argument to demonstrate that the result will differ if the interests of an American national are involved; or if only Latvian citizens were affected, whether or not they were, in 1940-41, supporters of the Nazi regime.

4. The Custodian, by his vesting order, prevented orderly adjudication of the claims we assert. He now asserts that our claim for restitution may not be heard judicially, because raising a "political question". If so, what has

become of the remedy provided under the Act for determination of whether a mistake was made in the vesting? (*Central Union Trust Co.* v. *Garvan,* 254 U. S. 554). Petitioner's agent had actual title and possession of the vessels and then their proceeds. Orderly litigation was proceeding as to the respective rights of ownership therein. Suddenly, somehow, petitioner is deprived of a trial of its claims. May the Trading With the Enemy Act be so construed and applied?

Petitioner's agent, whose custody was petitioner's, could not resist the vesting order when it was served on him. But for that very reason he was entitled to a trial of his claim:

> "there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."
>
> *Stoehr* v. *Wallace,* 255 U. S. 239.

Is this statement of the reasons for permitting the summary vesting of property to be now amended to read:

> but full hearing shall be denied when the vesting agency certifies a political question adversely to the claimant with respect to a foreign law which is part of the chain of his title?

To permit, by leaving the decision below to stand, the Attorney General to promulgate such an exception is not compatible with the Fifth Amendment or the prior decisions of this Court, construing and applying the Trading With the Enemy Act. An alien corporation, even of an unrecognized country, is entitled to the protection of the Fifth Amendment in respect of the Government's power to requisition:

> *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481;

No less protection should be afforded when the question is of the power to seize enemy property.

> *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 487-8.

The questions presented here are judicial exactly as when "just compensation" is to be inquired into:

> *Monongahela Navigation Company* v. *U. S.*, 148 U. S. 312.
>
> "It does not rest with the public taking the property, through Congress, the Legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry" (at p. 327).[17]

The rule is the same when the propriety of a seizure under the vesting power is sought to be questioned. The statute provides that "The court is to determine whether his claim is established." *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 501.

> "Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of a claim" (*id.*).

This Court said in the *Jackson* case, "however the issues were labeled the court was authorized to determine them" (p. 503). But the court below declined to consider the "usual rules", or whether (granting that in a proper case a decree of an unrecognized regime might be of limited effect) this was a case in which as between an alien corporation of a wartime ally and alien nationals who might be proved to have Nazi connections the nationalization decree might under what is now the better view, be given effect.

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[17] See also, *United States* v. *New River Collieries Co.*, 262 U. S. 341.

CONCLUSION

The only case brought here previously involving a Baltic ship was *Tiedemann* v. *Estroduras S. S. Co.*, 319 U. S. 774, denying *certiorari* to review 133 F. 2d 719. Of course, no inference may be drawn from the denial of *certiorari*. And, in any event, that decision, like others cited below, had a decisive distinguishing factor overlooked by the court below: the cases were decided when the Germans were in full occupation of Latvia, Esthonia and Lithuania, and so no claim arguably could have been presented for extending the benefit of decisions such as *Salimoff*, to those claiming under a regime *not actually existing de facto*.[18]

Non-recognition remains a diplomatic tactic much resorted to by the U. S. State Department. We make no contention here as to the propriety of its exercise. But the fact of its exercise sows, like dragon's teeth, a crop of controversies which will rise to plague the courts. Such controversies involving the Chinese mainland regime now begin to appear. There will be others. Authoritative exposition by this Court as to the present value of old concepts, and the actual merit of the latter-day "political question" school of pleading and trying cases, is sorely needed. A decision of an American court disavowing concern with the "usual rules applicable" under the conflict of laws presents a controversy meriting exercise of this Court's power of supervision, and authority to expound the principles of law at stake.

We respectfully pray the petition herein be granted.

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[18] The Fifth Circuit expressly based its decision with respect to the claim of Estonian State S. S. Line on this ground. "We take knowledge of the fact that by force of arms Germany has usurped and taken custody and control of Estonia from Russia, and that the status of Estonia as a nation will be determined by future events" (133 F. (2d) at p. 720).